Supreme Court, U.S.
FILED
MAR 30 1995
OFFICE OF THE CLERK

No. 94-1316

In The

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,

Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL PORK PRODUCERS COUNCIL, AS AMICUS CURIAE, IN SUPPORT OF DEFENDANT-PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

JOHN D. COPELAND
P.O. Box 10383
Des Moines, Iowa 50306
(515) 223-2600

Counsel for Amicus Curiae National Pork Producers Council

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28

QUESTIONS PRESENTED

A. Whether a dairy farm that uses its animal manure to fertilize its feed crop fields is a "concentrated animal feeding operation" and thus a point source subject to the permit requirements of the Clean Water Act?

B. Whether manure-spreading equipment or a depression in a farm field, neither of which directly discharges pollutants into navigable waters, is a point source subject to the permit requirements of the Clean Water Act?

C. Whether liquid manure washed off farm fields by a rainstorm is an "agricultural stormwater discharge" exempt from the Clean Water Act's definition of point source?

D. Whether the Second Circuit Court of Appeals should have exercised restraint and referred this matter to the appropriate state or federal regulatory agency to be handled within the administrative framework established and designed specifically to address circumstances such as those presented in this case?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

I. AMICUS CURIAE'S INTEREST IN THE PROCEEDING 1

II. FACTUAL BACKGROUND..... 3

III. ARGUMENTS 4

A. WHETHER A DAIRY FARM THAT USES ITS ANIMAL MANURE TO FERTILIZE ITS FEED CROP FIELDS IS A "CONCENTRATED ANIMAL FEEDING OPERATION" AND THUS A POINT SOURCE SUBJECT TO THE PERMIT REQUIREMENTS OF THE CLEAN WATER ACT?... 4

1. Southview Farm is not a "concentrated animal feeding operation" under the most reasoned interpretation of relevant statutory language 4

2. Regulation of nonpoint sources is properly within the purview of the state regulatory agency..... 12

B. WHETHER MANURE-SPREADING EQUIPMENT OR A DEPRESSION IN A FARM FIELD, NEITHER OF WHICH DIRECTLY DISCHARGES POLLUTANTS INTO NAVIGABLE WATERS, IS A POINT SOURCE SUBJECT TO THE PERMIT REQUIREMENTS OF THE CLEAN WATER ACT?... 16

C. WHETHER LIQUID MANURE WASHED OFF FARM FIELDS BY A RAINSTORM IS AN "AGRICULTURAL STORMWATER DISCHARGE" EXEMPT FROM THE CLEAN WATER ACT'S DEFINITION OF POINT SOURCE? 18

TABLE OF CONTENTS – Continued

Page

D. WHETHER THE SECOND CIRCUIT COURT OF APPEALS SHOULD HAVE EXERCISED RESTRAINT AND REFERRED THIS MATTER TO THE APPROPRIATE STATE OR FEDERAL REGULATORY AGENCY TO BE HANDLED WITHIN THE ADMINISTRATIVE FRAMEWORK ESTABLISHED AND DESIGNED SPECIFICALLY TO ADDRESS CIRCUMSTANCES SUCH AS THOSE PRESENTED IN THIS CASE? 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASE:

Kelly v. EPA, 15 F.3d 1100 (D.C. Cir. 1994).....18, 20

STATUTES AND REGULATIONS:

33 U.S.C. § 1251 3

33 U.S.C. § 1288(b)(2)(f) 5

33 U.S.C. § 1329 6

33 U.S.C. § 1342 6

33 U.S.C. § 1362(14) 6

42 U.S.C. § 7401 .....4, 5

40 C.F.R. 15.4 9

40 C.F.R. 51.165 .....9, 10

40 C.F.R. 61.91(b) 9

40 C.F.R. 122.23(b) 7, 8, 10, 11, 12

58 Fed. Reg. 7610 17

Pub. L. No. 92-500, 86 Stat. 816 5

133 Cong. Rec. § 1691-01 .....5, 13

MISCELLANEOUS:

Copeland et al., *Environmental Laws Impacting New York Livestock Operations* 14

Guide to Environmental Quality in Pork Production, (Published by the National Pork Producers Council Environmental Committee, Fall, 1992)..... 2

TABLE OF AUTHORITIES – Continued

Page

S. Marberry, *Appeals Court Calls Manure Spreading a 'Point Source,'* FEEDSTUFFS, Oct. 24, 1994, at 1 14

Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982) 19

S. Rep. No. 370, 95th Cong., 1st Sess. 8 (1977) 5

U.S.D.A. HOGS AND PIGS, Dec. 1, 1993 1

U.S. EPA, Office of Water, *Nonpoint Source Guidance* 3 (1987) 6

I. AMICUS CURIAE'S INTEREST IN THE PROCEEDING

National Pork Producers Council (NPPC) is a nongovernmental, voluntary organization and is the largest commodity organization in the nation with an identified membership. NPPC is a grassroots producer organization made up of 45 affiliate state pork producer associations which have 90,000 members. NPPC is headquartered in Des Moines, Iowa and has an office in Washington, D.C. Its major purpose is the enhancement of the quality, production, distribution, and sale of pork and pork products. NPPC has an extensive environmental program that funds environmental research, conducts educational activities for producers, promotes science-based environmental policies, and helps producers confront challenges related to environmental law.

Pork production in the U.S. has risen steadily over the last 40 years. Pork has annual gross sales of over $11 billion, and approximately 236,000 pork producers raise 17 billion pounds of pork. The ten leading states in hog and pig inventory are Iowa, North Carolina, Illinois, Minnesota, Nebraska, Indiana, Missouri, South Dakota, Ohio, and Kansas. Ninety-three million head were commercially slaughtered in 1993 with the state of New York ranked 31st in annual marketings of hogs in that year, with 112,000 head. In 1993 the number of hog operations in the U.S. totalled 235,840.[1]

NPPC is vitally involved in advancing pork production interests. NPPC is actively involved in legislation

---

[1] U.S. DEP'T OF AGRIC., HOGS & PIGS (1993).

which affects hog producers nationally and closely monitors federal and state laws and regulations, including those related to environmental regulation.

NPPC's Environmental Committee addresses key environmental issues facing the modern pork production facility. The Council's Science Advisory Task Force advises pork producers nationwide about the basic considerations involved in proper environmental management of an operation including manure application, water quality protection, and regulatory compliance.[2] In addition, NPPC has funded a thorough state-by-state examination of laws and regulations involving environmental aspects of hog production. This educational project is being carried out by the National Center for Agricultural Law Research and Information.

NPPC therefore has a vital interest in the subject matter involved in this litigation. NPPC is actively involved in advising its membership of the state and federal laws affecting their operations and is equally involved in representing member interests when those laws and regulations are considered and passed. NPPC's *amicus brief* provides the court with important information regarding the laws and regulations which apply in the Southview case and how the outcome of this case will affect hog producers nationwide.

---

[2] The first joint publication of Committee and Task Force was the *Guide to Environmental Quality in Pork Production* (Fall 1992).

The description of Southview's dairy operation is not unlike the operations of countless hog producers nationwide. The activity of gathering and confining animals and managing the attendant manure from those operations by separation, storage, and eventual land application is a common practice within the agriculture sector. Approximately 85% of hogs are raised in confinement where manure is collected and stored for later treatment and/or utilization. The nature of Southview's operation intricately ties the facts of this case to the interests represented by NPPC and many other agricultural producers in the country.

II. FACTUAL BACKGROUND

The brief filed by Southview Farm with its Petition for Writ of Certiorari contains a detailed statement of facts. Therefore, only the following summary of facts is set forth in this *Amicus Brief*.

Southview Farm operates a 2,200 head dairy farm in rural Wyoming County, New York. Within that county, dairy farming is the largest industry. Southview Farm's operation involves a manure separation and storage system and the spreading of manure on crop lands adjacent to the animal confinement area. The action against Southview Farm was brought as a "citizen's suit" under the Federal Water Pollution Control Act, renamed as the Clean Water Act (CWA).[3] The citizen's suit brought against Southview Farm alleged violations of the CWA; specifically Section 301(a) which prohibits the discharge

---

[3] 33 U.S.C. §§ 1251 *et seq.*

of pollutants. The Plaintiffs alleged violations of these provisions through leakage of manure from Southview Farm's storage lagoon into local surface waters and ground waters and from there into the Genesee River. In addition, Plaintiffs alleged that on several occasions Southview Farm sprayed liquid manure onto land in such quantities that it ran into discrete rivulets, into drainage ditches, and into adjacent surface waters that tributary into the Genesee River, and that Southview Farm sprayed liquid manure directly into such drainage ditches.

III. ARGUMENTS

A. WHETHER A DAIRY FARM THAT USES ITS ANIMAL MANURE TO FERTILIZE ITS FEED CROP FIELDS IS A "CONCENTRATED ANIMAL FEEDING OPERATION" AND THUS A POINT SOURCE SUBJECT TO THE PERMIT REQUIREMENTS OF THE CLEAN WATER ACT?

1. Southview Farm is not a "concentrated animal feeding operation" under the most reasoned interpretation of relevant statutory language.

In 1955, Congress first enacted legislation to control the polluting of the waters of the United States.[4] Unfortunately, the legislation did little to abate the amount of pollutants pumped, washed, or dumped into our national waters. Responding to the public demand for more stringent water quality controls, Congress in 1972 passed what was to become known as the Clean Water Act

---

[4] 42 U.S.C. §§ 7401 *et seq.* (West 1955).

(CWA).[5] In enacting the 1972 CWA, Congress more thoroughly addressed the long term national goal of eliminating pollutants from United States waters in order to achieve and maintain the biological integrity of receiving waters and the interim goal of assuring that the nation's waters would at least support fish, wildlife, and sporting activities, and provide safe drinking water.[6]

Congress embodied in the CWA a dual regulatory system for safeguarding the nation's waters from pollution by expressly giving the federal government and state governments regulatory authority over different sources of pollution. In passing the 1972 legislation, "Congress made a clear and precise distinction between *point sources*, which would be subject to federal regulation, and *nonpoint sources*, control of which was specifically reserved to State and local governments."[7] In addition when Congress enacted the 1972 Amendments it thoughtfully considered how to regulate agricultural activities and, with the exception of concentrated animal feeding operations (CAFOs), Congress chose to regulate agricultural activities under the nonpoint source control provisions of section 208.[8]

Section 208 requires each state to develop management plans to address significant water problems. The management plans must assess both point source and

---

[5] *Id.*

[6] 133 Cong. Reg. § 1691-01 (remarks of Leon G. Billings).

[7] S. Rep. No. 370, 95th Cong., 1st Sess. 8 (1977).

[8] Pub. L. No. 92-500, Section 208(b)(2)(f), 86 Stat. 816, 841, codified as amended at 33 U.S.C. § 1288(b)(2)(f).

nonpoint source problems. Return flows from irrigated land, runoff from manure disposal, and runoff from land used for livestock are to be covered in the management plans. Section 208 also requires states to specify feasible measures for controlling nonpoint source agricultural pollution.[9]

Congress defined point sources of pollution as pollution originating from a "discernable, confined and discrete conveyance."[10] This definition, with the exception of the inclusion of a CAFO, is oriented toward industrial and municipal polluters, not agricultural operations. Point source polluters are regulated by mandated technology-based standards and the requirement that they obtain a National Pollutant Discharge Elimination System (NPDES) permit from EPA prior to making discharges.[11] Congress has not chosen to specifically define what is meant by the term "nonpoint." However, the Environmental Protection Agency, which has been delegated the authority to implement and enforce the point source provisions of the CWA, has stated that "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."[12]

---

[9] *Id.*, *see also* 33 U.S.C. § 1329. New York has adopted such a program and the program has been approved by the EPA.

[10] 33 U.S.C. § 1362(14).

[11] 33 U.S.C. § 1342.

[12] U.S. EPA, Office of Water, *Nonpoint Source Guidance* 3 (1987).

In the 1972 CWA, Congress went to great lengths to ensure that most agricultural activities would be classed as nonpoint sources of pollution and thereby subject primarily to state regulation. Congress did specifically choose to regulate one limited area of agricultural activity as a point source of pollution, Concentrated Animal Feeding Operations (CAFOs). Although Congress did not define a CAFO, CAFO is defined in the Code of Federal Regulations for the EPA at Section 122.23(b)(3) as follows:

> "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Appendix B of this part, or which the Director designates under paragraph (c) of this section.[13]

An agricultural livestock operation is classified as a CAFO only if it is an "animal feeding operation" (AFO) and the operation exceeds the minimum livestock requirements of Appendix B.[14]

> An "animal feeding operation" is:
>
> . . . a *lot or facility* (emphasis added) (other than an aquatic animal production facility) where the following conditions are met:
>
> > (1) Animals (other than aquatic animals) have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period, and

---

[13] 40 C.F.R. 122.23(b).

[14] Federal regulations set forth the minimum livestock requirement for slaughter and feeder cattle, dairy cattle, swine, horses, turkeys, laying hens or broilers, ducks and other animal units. *See* 40 C.F.R. § 122.23, Appendix B to Part 122, (a) and (b).

> (2) crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.[15]

In holding Southview Farm to be a CAFO, and thereby a point source because it is an animal feeding operation and "no crops . . . were sustained . . . over any portion of the *lot*," the Second Circuit Court of Appeals misconstrued the definition of an animal feeding operation. The Court of Appeals stated that the terms lot or facility, since undefined by the regulations, should be defined by the term "feedlot" found in 40 C.F.R. 412.10(b). Feedlot is defined as a concentrated, confined animal growing operation for meat, milk, or egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and crop or forage growth or production is not sustained *in the area of confinement*. An animal feeding operation is defined differently, which implies that, although some animal feeding operations may be feedlots, not all of these will be defined as feedlots. The key difference in the definitions lies in the statement that an animal feeding operation does not include those operations which sustain crops, vegetation or post harvest residues *over any portion of the lot or facility*. Only feedlots require crops in the specific area of confinement to avoid being classified as CAFOs.

The EPA intended animal feeding operations to be subject to a broader definition by making the standard more inclusive. Instead of limiting the vegetative forage growth or crops to the area of confinement, as in the

---

[15] 40 C.F.R. 122.23(b)(1).

feedlot situation, the EPA used the terms lot or facility. EPA Clean Air Act (CAA) regulations have traditionally defined facility in a much broader manner. For example, the EPA has defined facility as "all buildings, structures and *operations* on one contiguous site," in the air programs regulations (emphasis added).[16] In addition, EPA defines building, structure, *facility*, or installation as:

> all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). . . . [17]

EPA also has a third definition of facility which is similar to those definitions already discussed:

> "Facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location or site of operations owned, leased, or supervised by an applicant, contractor, grantee, or borrower to be used in the performance of a contract, grant, or loan. Where location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility. . . . [18]

---

[16] 40 C.F.R. 61.91(b) (1994) (section contains definitions relating to national emission standards for emissions of radionuclides other than radon from Department of Energy facilities).

[17] 40 C.F.R. 51.165(a)(1)(ii) (1994) (permit requirements for air programs and requirements for preparation, adoption, and submittal of implementation plans).

[18] 40 C.F.R. 15.4 (1994).

In its attempt to determine the meaning of a term undefined in the applicable statute or regulation, the court erred in not first referring to the definition of the *same* term in similar statutory or regulatory language. The court instead took the suggestion of the United States Department of Justice and equated the language "lot or facility" to the term "feedlot" and proceeded in its analysis from that point. By doing so the court ignored the fact that the term "facility", the exact term in the regulation at issue, is defined in similar regulations under the Clean Air Act (CAA) at 40 C.F.R. 51.165.

If the Second Circuit Court of Appeals had referred to the facility definitions provided in the CAA, the court would have had no choice but to conclude that Southview Farm is not an animal feeding operation or a feedlot as defined in the CWA. The Southview Farm facility includes the confinement facility as well as the contiguous or adjacent land in the area of confinement on which crops or forage are grown. The manure is applied to the adjacent crop or forage land and the entire operation is under the control of the same person (Southview Farm).

The inclusion of the language "lot or facility" in 40 C.F.R. 122.23(b)(ii) clearly requires a broader reading of the regulation than that given by the Second Circuit Court of Appeals. Obviously, the EPA has expressed a general intent to consider an entire operation to include the cropland that is contiguous to the confinement facilities, as in this case.

By reading and defining the terms of the regulation so narrowly, the court has in effect rendered the "crop/

vegetative growth" exception, that had been specifically drafted into the definition of an AFO, a nullity. In doing so, the court has included virtually every livestock farm operation within the definition of an AFO; thereby potentially subjecting all such operations to regulation as a CAFO point source with the determinative factor being the number of animals within the operation. If the court is correct, the exception for livestock operations would not have been necessary and would never have been drafted into the definition of an AFO in 40 C.F.R. 122.23(b)(ii).

Additionally, if the EPA had intended the term "feedlot" to be included in the definition of an AFO they would have used the term "feedlot" rather than the language "lot or facility." The term "feedlot" itself suggests a more restricted and confined area that is to serve a more particular purpose than the language "lot or facility" suggests.

The second method by which an agricultural livestock operation may be classified as a CAFO is that the EPA director may on a case-by-case determination designate an agricultural livestock operation as a CAFO. The director may do so only after determining that "the operation is a *significant contributor* (emphasis added) of pollution to the waters of the United States."[19]

By providing an additional method of regulating agricultural livestock operations as CAFOs, the regulations specifically provide the EPA with a means by which to regulate operations like Southview Farm as point

---

[19] 40 C.F.R. 122.23(c).

sources if the circumstance so warrants. This is further proof that CAFO facilities such as Southview Farm were never intended to be regulated as point sources under the definition in 40 C.F.R. 122.23. In addition, the EPA has not chosen to regulate Southview by this method.

2. Regulation of nonpoint sources is properly within the purview of the state regulatory agency.

Under the Clean Water Act, point sources of pollution are regulated and are required to obtain a permit, either through the state or federal permitting scheme. New York has obtained permission from the EPA to implement and control its own permitting scheme for point sources of pollution. As a result, New York has determined that an agricultural operation which includes the raising of livestock and the growing of crops on a single lot or facility is not an "animal feeding operation" and therefore is not a "concentrated animal feeding operation."

Congressional debate over the CWA specifically contains references to the proper role of the states in regulating potential polluters. In 1987, President Reagan vetoed the 1987 amendments to the CWA because he feared that the amendments would give the Federal Government too much authority over farming practices. In successfully urging the Senate to join the House to override the President's veto, Senator John Chaffee of Rhode Island pointedly stressed that nonpoint sources of pollution would still be left to state control:

. . . the President states in his veto message that when we get into the nonpoint pollution control section of this bill, that this is Federal land use planning. There is a mistake in the interpretation that was given to the President on this. It just is not Federal land planning.

The nonpoint provisions in the bill were carefully crafted to avoid that. The primary role of the Federal Government in the nonpoint program, in other words, controling [sic] pollution from streets and runoff of fertilizers from the farms, the primary role of the Federal Government is to provide financial assistance to the States which are given the lead in developing their own programs. It is not Big Brother from Washington telling them how to do this. The States do this. We give them some money to help them. We do not mandate it. Farmers are not required to seek permission from the Federal Government to carry out their farming practices.

We have been around long enough to know that is a loser. That would kill the bill. Do you think the Senators from Montana or Maine or any of the States with large agricultural practices would vote for a measure like that? Of course they would not.

So the administration's arguments on that are really red herrings.

This is a strong environmental bill, it is a fiscally responsible bill, and it lives up to our national goal of making the Nation's waters fishable and swimmable.[20]

---

[20] 133 Cong. Rec. § 1691-01.

The State of New York has established an extensive regulatory scheme to control both point and nonpoint source pollution. New York obtained EPA approval to run its state NPDES program on October 28, 1975 and established a program implementing the CWA permitting (NPDES) programs.[21] New York has passed state laws and adopted state regulations to require all point sources within the state to obtain a State Pollution Discharge Elimination System (SPDES) permit.[22] New York has always used the SPDES system for industries, but has generally considered agricultural operations to be exempt from permitting requirements. New York interpreted the terms "lot" or "facility" to include structures where livestock were housed and adjacent cropland was used for animal manure application. If an operation caused environmental damage, the state issued a cease and desist order requiring them to comply with the order.[23]

New York's interpretation is permissible in that the EPA has never attempted to correct the state's interpretation regarding agriculture, nor has the EPA criticized any

---

[21] *See* JOHN D. COPELAND ET AL., *Environmental Laws Impacting New York Livestock Operations* (1995) (Published by the National Center for Agricultural Law Research and Information, 147 Waterman Hall, University of Arkansas School of Law, Fayetteville, AR 72701).

[22] The SPDES is the New York State version of the National Pollution Discharge Elimination System (NPDES) permit.

[23] Steve Marberry, *Appeals Court Calls Manure Spreading a 'Point Source,'* FEEDSTUFFS, Oct. 24, 1994, at 1. *See also* JOHN D. COPELAND ET AL., *Environmental Laws Impacting New York Livestock Operations* (1995) (Published by the National Center for Agricultural Law Research and Information, 147 Waterman Hall, University of Arkansas School of Law, Fayetteville, AR 72701).

other aspects of New York's environmental program. In the past, EPA has exercised authority over those programs that were deemed to be ineffective in curbing water pollution. One of the most recent examples is the establishment, through federal regulatory means, of a General Permit for four of the five states in Region VI of the United States.[24] This General Permit establishes a mechanism by which CAFOs in those states may be covered under a federal NPDES General Permit, determines the types of discharges allowed from those operations, and establishes requirements for land application of waste.

The court, through the encouragement of the EPA, has done for the EPA that which the EPA could not do given the facts of the case; i.e., require Southview Farm to have a permit based on a finding that it was a CAFO. If the facts had warranted it, the EPA had the authority to declare Southview Farm a point source, whether or not it fell under the definition of a CAFO, if Southview Farm was a "significant contributor" to pollution. The "significant contributor" provision, which is a feature of both the federal regulatory definition of AFO/CAFO and the New York state program, allows the regulatory authority to regulate an operation as if it were a point source polluter even though the operation may not come under the definition of a CAFO.

Southview Farm, however, was not declared a point source by the EPA or the state regulatory authority, even

---

[24] The four states covered under the Region VI General Permit are Louisiana, New Mexico, Oklahoma, and Texas.

after complaints had been received and investigated regarding Southview Farm's operations. Some of these complaints were made by the members of the group which later became the plaintiffs in this case. Southview Farm's manure handling practices were thoroughly investigated and it was determined that Southview Farm did not need to obtain a permit because the operation was not a point source under the state's CAFO definition. Also, the facts did not warrant identifying Southview Farm as a "significant contributor" to pollution.

Clearly, the Second Circuit Court of Appeals erred in declaring Southview Farm to be subject to the CAFO permitting requirements of the CWA.

B. WHETHER MANURE-SPREADING EQUIPMENT OR A DEPRESSION IN A FARM FIELD, NEITHER OF WHICH DIRECTLY DISCHARGES POLLUTANTS INTO NAVIGABLE WATERS, IS A POINT SOURCE SUBJECT TO THE PERMIT REQUIREMENTS OF THE CLEAN WATER ACT?

The Second Circuit Court of Appeals also erred in holding Southview Farm's manure spreading equipment to be a point source. To sustain a ruling that land application vehicles are point sources would take away the distinction between nonpoint and point sources. Land application of animal manure is a traditional nonpoint source and to hold that the land application vehicles are point sources would create no viable alternative for getting liquid manure onto fields. If this aspect of land application is a point source, then it is virtually impossible to use land application as a method for disposing of

manure. However, almost all states *encourage* the use of land application by operations in order to cut down on the disposal problems of the liquid waste. Using land application achieves this result and creates an inexpensive and less chemical dependent method of fertilization. In fact, the EPA Region VI General Permit authorizes the use of land application of waste generated by CAFOs when done so in accordance with recognized practices of good agricultural management.[25] The EPA admits that the land application of waste is a normal "agricultural practice" and when "properly applied, animal wastes provide no more environmental risk than chemical fertilizers which would be used on the same land".[26]

To hold that the land application of animal manure is a point source as a result of the use of vehicles to apply the waste would result in complete chaos in major livestock producing states, especially when those states attempt to find new methods of waste disposal. To hold that a roving piece of equipment used in the application of waste to the land is a point source takes chaos into pandemonium in that it raises the issue as to whether other moving vehicles used in agricultural operations can also be considered point sources.

If the Second Circuit Court's ruling is allowed to stand, the costs to producers and consumers could dramatically escalate. The EPA estimates there are only 6,000 potential animal feeding operations nationwide. But a pork industry study found over 30,000 operations with

---

[25] 58 Fed. Reg. 7610, 7629 (Feb. 8, 1993).

[26] *Id.*, at 7622 (Feb. 8, 1993).

more than 1,000 head of swine. Since almost all of these operations use land application as a form of manure utilization and/or treatment, the number of permittees will skyrocket. Those states which currently run federally approved water quality permitting programs will be forced to regulate even the smallest of operations as point sources. Many agricultural operations may be forced out of business if they are unable to find alternate sources of disposing of animal manure or cannot bear the costs associated with using alternate disposal methods, such as paying for the transportation of the manure to approved offsite places of disposal. The court's ruling could also affect the availability of agricultural credit by further worsening an already difficult situation. Lenders will have to worry about their own CWA liability if virtually all livestock operations, which use the traditional means of applying animal manure to adjacent crop or forage land, are declared to be CAFOs. *See Kelly v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994) (holding that lenders may be liable under CERCLA).

C. WHETHER LIQUID MANURE WASHED OFF FARM FIELDS BY A RAINSTORM IS AN "AGRICULTURAL STORMWATER DISCHARGE" EXEMPT FROM THE CLEAN WATER ACT'S DEFINITION OF POINT SOURCE?

The question of what Congress intended by exempting agricultural stormwater discharges from the definition of a point source has been adequately argued in the Petition for Writ of Certiorari submitted by Petitioners. NPPC agrees and incorporates the argument contained

on pages 15 through 18 of Petitioners' brief under the heading "Congress Expressly Exempted Agricultural Stormwater Discharges From the Definition of Point Source."

D. WHETHER THE SECOND CIRCUIT COURT OF APPEALS SHOULD HAVE EXERCISED RESTRAINT AND REFERRED THIS MATTER TO THE APPROPRIATE STATE OR FEDERAL REGULATORY AGENCY TO BE HANDLED WITHIN THE ADMINISTRATIVE FRAMEWORK ESTABLISHED AND DESIGNED SPECIFICALLY TO ADDRESS CIRCUMSTANCES SUCH AS THOSE PRESENTED IN THIS CASE?

In the Southview Farm case the Second Circuit would have better served the interests of all parties concerned by subscribing to the age old doctrine of judicial restraint which teaches "that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."[27] As explained in this amicus, the Second Circuit erroneously classified Southview Farm as a point source subject to the CAFO provisions of the CWA. The court totally ignored the extensive regulatory scheme for both point and nonpoint sources established by the State of New York with the blessing of the EPA. The court also ignored the state and federal statutory and regulatory provisions which would have permitted action against

---

[27] John P. Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982).

Southview Farm if the facts had established Southview to be a "significant contributor" to pollution.

By deferring this matter to state regulators, the court could have avoided the potential chaos its ruling may create in agricultural production methods, in the state and federal environmental regulation of agriculture, and agricultural lending. By acting as it did, the court has called into question the heretofore accepted agricultural practices of thousands of farmers in dozens of states, the existing agricultural regulatory system of no less than 20 states and the Federal Government, and has further tightened the purse strings of the already weary agricultural lenders who have an eye towards the previously mentioned *Kelly* case.

Unless the Supreme Court grants certiorari the ruling of the Second Circuit Court of Appeals will have an unwarranted and legally indefensible negative nationwide impact on livestock operations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari filed by petitioner Southview Farm should be granted.

Respectfully submitted,

JOHN D. COPELAND
P.O. Box 10383
Des Moines, Iowa 50306
(515) 223-2600

Counsel for Amicus Curiae
National Pork Producers
Council